Supreme Court, U.S.
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No. 97-327

In The

Supreme Court of the United States

October Term, 1996

CONSUMERS EDUCATION & PROTECTIVE ASSOCIATION, AND LANCE HAVER,

Petitioners,

v.

PENNSYLVANIA MILK MARKETING BOARD, LEHIGH VALLEY DAIRIES, INC., ATLANTIC DAIRY COOPERATIVE, PENNSYLVANIA ASSOCIATION OF MILK DEALERS, ROSENBERGER'S DAIRY, INC., CLOVER FARMS DAIRY, AND WAWA DAIRY,

Respondents.

On Petition For A Writ Of Certiorari To The Commonwealth Court Of Pennsylvania

REPLY BRIEF

ERIC B. SCHNURER
Counsel of Record
1690 Strasburg Road
West Chester, PA 19380
(610) 296-9443

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Before moving to the central question posed by this Petition for Certiorari, it is important to clear up a few factual errors made in Respondents' briefs.

1. The answering Respondents, all of them milk dealers, begin by asserting that it is the *School District* who is in the business of selling milk for exorbitant profit. While Respondents suggest that the per-meal reimbursements received by the School District greatly exceed the "cost for food" for such meals, *Brief of Respondents Lehigh Valley Dairies, Inc., et al.* (hereinafter *Milk Dealers' Brief*) at 2, they fail to note the *non-food* costs, e.g., labor and overhead, which, the Food Services Director testified, can run more than double the cost of the food. Moreover, the School District's for-profit milk sales constitute only about 0.05% of the District's annual milk volume, consisting almost entirely of market-price sale to employee groups for use in their coffee. *See id.*, App. at 1a. Almost all the rest is, indeed, "given away."

2. Respondents deny that "milk prices are truly contributing to any condition of economic extremis for the School District of Philadelphia." *Id.* at 3. It is self-evident, however, that the School District could spend more money on *education* – according to the record, $1 million per year, R. 281a – if it could spend less on milk at inflated prices.

3. Respondents next assert that "[i]t is . . . appropriate to point out that the School District of Philadelphia has not filed any brief in support of the Petition." *Milk*

Dealers' Brief at 4. As the Respondents themselves concede, however, *id.*, the School District was dismissed from similar prior federal litigation, *School District of Philadelphia v. Pennsylvania Milk Marketing Board ("SDP")*, 877 F. Supp. 245, 254 (E.D. Pa. 1995), on the ground that, as a state instrumentality, it lacked standing to sue the state for constitutional violations in federal court, which would similarly apply to its standing in *this* Court. That said, it is "appropriate to point out" that neither the state agency nor the state itself, but only a bevy of milk industry interests, has filed any brief in this Court in support of the state's own statute.

Let us now turn to Respondents' understanding of the law.

The Respondents argue primarily that the Pennsylvania Milk Marketing Law has repeatedly been upheld by the courts. *Milk Dealers' Brief* at 6, 9; *Brief of Respondent Atlantic Dairy Cooperative in Opposition* at 4. But even they must concede that the vast bulk of these decisions did not involve commerce clause challenges. *See Milk Dealers' Brief* at 11 ("the commerce clause was not invoked"). Respondents' citation to *Nebbia v. New York*, 291 U.S. 502 (1934), *see Milk Dealers' Brief* at 6, is the most glaring example: *Nebbia* was not a commerce clause challenge at all. When such a challenge was brought nine months later, the statute was struck down. *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 94 (1934).

In fact, only *three* of the cited cases involve the commerce clause – and the two from Pennsylvania district courts are not at all in accord: Despite Respondents' insinuation to the contrary, *id.* at 6, the Eastern District in

SDP, supra, clearly did *not* follow the Middle District's rather summary commerce clause treatment in *United Dairy Farm Cooperative Ass'n v. Milk Control Comm'n of Pa.*, 335 F. Supp 108 (M.D. Pa. 1971), finding instead that precedent of this Court "would seem to support Plaintiffs' theory that the instant regulations do impose burdens on interstate commerce." *SDP,* 877 F. Supp. at 252.

Moreover, while this Court upheld Pennsylvania milk control law against a commerce clause challenge in *Milk Control Board of Pa. v. Eisenberg Farm Products,* 306 U.S. 346 (1939), *Eisenberg* turns primarily on the fact that only "a small fraction of the milk produced . . . in Pennsylvania is shipped out of the Commonwealth." *Id.* at 353. As discussed in the Petition, however, the milk industry has changed tremendously since 1939, so that "local" price regulations now have significant effects on interstate trade, with "fully 55% of the milk [from the Philadelphia area] distributed outside the state." *Lily Penn Food Stores v. Milk Marketing Board,* 437 A.2d 485 (Pa. Cmwlth. 1981). *Eisenberg's* relevance to, and continued vitality in, the modern interstate milk market is thus highly dubious. *Eisenberg* is also explicable – and thus easily distinguishable – on the ground that the precise issue presented involved, in stark contrast to *this* case, Pennsylvania's *disadvantaging* of its own produce in interstate shipment. *Cf.* L. Tribe, AMERICAN CONSTITUTIONAL LAW (2d ed. 1987) at 408 *et seq.* (burdening of in-state economic interests generally not the focus of constitutional concern).

That makes crucial the accurate statement of the issue posed by this case. Petitioners do *not* make the "shocking" assertion "that the Pennsylvania pricing scheme must fall because it sets prices with reference

only to *in-state* dealers already doing business in the particular milk marketing area." *Milk Dealers' Brief* at 13 (emphasis added). What Petitioners *do* assert is that "[t]he minimum price below which no-one may sell milk in Pennsylvania is derived by reference to *only* milk distributors *already doing business* in the particular 'milk marketing area' in question *in Pennsylvania.*" Petition for Certiorari at 11-12 (emphasis in original). Those *"already doing business"* in the state do include some *non*-domestic businesses (although not many, as indicated by the fact that PMMB's supposedly representative cross-section included only *one* out-of-state dealer). Such businesses are "out-of-state" in the sense of having their processing operations or domicile out-of-state – but those few are necessarily already *operating* in the in-state market, or, by law, they could not be included in the minimum price calculation.

Petitioners contend that this discriminates in favor of those *already operating in the Pennsylvania market* (the vast bulk of whom are Pennsylvania firms) and against those *not already operating in the Pennsylvania market* (all of whom are, by definition, *non*-Pennsylvania firms), by denying the latter "outsiders" the ability to come into the market from out-of-state and "peel off" market share by selling at a lower price – what this Court's jurisprudence has repeatedly emphasized is the core requirement of the commerce clause. *See, e.g., West Lynn Creamery v. Healy,* 512 U.S. 186, 193 (1994); *Brown-Forman Distillers v. New York State,* 476 U.S. 573, 580 (1986).

If Petitioners accurately describe the statute, then one would predict two effects: (1) Prices would tend to be higher, which, as discussed in the Petition for Certiorari,

is in fact the case. (2) Despite the interstate nature of today's milk market, "outsiders" would tend to *remain* "outsiders," resulting in relatively few out-of-state firms gaining significant Pennsylvania market share, which, as just mentioned, *also* happens to be the case. This propensity to exclude those *already outside the market*, who necessarily happen *all* to be out-of-staters, to the benefit of those *already in the market*, who are likely to be *in*-staters, renders this egregious law unconstitutional under the commerce clause.

Accurately stated, then, it is Petitioners' contention that, while the Pennsylvania Milk Marketing law may not *explicitly* either discriminate against out-of-staters or base price calculations expressly upon only domestic firms, *per se*, it does indeed do so more subtly. As this subtle discrimination is built into the statute (*see* 31 P.S. sec. 700j-801 ("producers, dealers and stores *in the area*") (emphasis added)), it is thus "facial," for it cannot be the law that a statute evades facial invalidity by simply avoiding use of the words "in-state" and "out-of-state" while, by design, effectively employing that very distinction.

It is in fact the subtleness of the discrimination that makes this case important: This Court need not be particularly vigilant to catch states that attack interstate commerce with a meat cleaver. It must, however, stand alert – and send clear warnings – to those states that try stealthily to eviscerate free trade with a stiletto. That is why this Court ought to grant the writ and reverse the judgment below.

Respectfully submitted,

ERIC B. SCHNURER
Counsel of Record